

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2261/2015
PERMIT APPLICATION NO. WH/2015/346

CATCHWORDS

Section 77 *Planning and Environment Act 1987*; Whitehorse Planning Scheme; Neighbourhood Residential Zone; Significant Landscape Overlay; Child care centre; Landscape; Neighbourhood character.

APPLICANT	Simgar Pty Ltd
RESPONSIBLE AUTHORITY	Whitehorse City Council
REFERRAL AUTHORITY	VicRoads
RESPONDENTS	M & A Crawshaw, C Nieuwenhuizen, Blackburn Village Residents' Group Inc., P & M Stafford, D & J Plumridge, D Tribe, S & G Rodwell, G & J Nicholls, G Cox, G & J Fletcher, M Gill, Blackburn and District Tree Preservation Society Inc., E Jacobs, B Alesich
SUBJECT LAND	199 Canterbury Road, Blackburn
WHERE HELD	Melbourne
BEFORE	Bill Sibonis, Member
HEARING TYPE	Hearing
DATES OF HEARING	10, 11, 12 and 15 February 2016
DATE OF ORDER	23 March 2016
CITATION	

ORDER

- 1 Pursuant to Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, the following person is joined as a party to this proceeding:
Bertram Alesich
- 2 The decision of the Responsible Authority is affirmed.
- 3 In permit application WH/2015/346 no permit is granted.

Bill Sibonis
Member



APPEARANCES

For Simgar Pty Ltd

Mr B Chessell of Counsel, instructed by Best Hooper Lawyers.

He called the following witnesses:

- Mr K Twite, Town Planner of SJB Planning Pty Ltd.
- Mr R Fairlie, Traffic Engineer of ratio:consultants Pty Ltd.
- Mr T Vernon, Landscape Architect of CDA Design Group Pty Ltd.
- Mr R Galbraith, Arboriculturalist of Galbraith & Associates.
- Mr D Tardio, Acoustic Consultant of Renzo Tonin & Associates.

The evidence (photomontages) of Mr S Schutt, Landscape Architect of Hansen Partnership, was tendered. Mr Schutt was not called to give oral evidence.

For Whitehorse City Council

Mr D Song, Town Planner of Song Bowden Planning Pty Ltd.

For Blackburn Village Residents' Group Inc.

Mr D Morrison

For D Tribe, Blackburn and District Tree Preservation Society, M Gill, G & J Nicholls, S & G Rodwell, E Jacobs, B Alesich

Ms D Tribe

For G Cox, G & J Fletcher, C Nieuwenhuizen

Mr G Cox

For A & M Crawshaw and P & M Stafford

Mr M Crawshaw

For D & J Plumridge

Ms S Rodwell

INFORMATION

Description of Proposal	The development and use of a child care centre, with a capacity of 120 children ¹ . A maximum of 20 staff are to be on the premises at any one time. The proposed hours of operation are 6.30am to 6.30pm Monday to Friday.
Nature of Proceeding	Application under Section 77 of the <i>Planning and Environment Act</i> 1987 – to review the refusal to grant a permit.
Zone and Overlays	Neighbourhood Residential Zone – Schedule 1, Bush Environment Areas (NRZ1). Significant Landscape Overlay – Schedule 2, Blackburn Area 2 (SLO2). Abuttal to a road in a Road Zone Category 1 (RDZ1).
Permit Requirements	Cl. 31.02 & 32.09-1 (use of land in NRZ1 for a child care centre). Cl. 32.09-7 (the construction of a building and the construction and carrying out of works for a Section 2 use on land in NRZ1). Cl. 42.03-2 (the construction of a building; the construction and carrying out of works; and the removal of vegetation on land in SLO2). Cl. 52.29 (creation or alteration of access to a road in an RDZ1).
Key Scheme, policies and provisions	Cl. 10, 15.01, 21, 22.04, 22.05, 32.09, 42.03, 52.06, 52.29 and 65.

¹ The Applicant advised that the number of children accommodated in the centre will be reduced to 116 as a consequence of modifying the car parking layout to address VicRoads' requirements (which necessitates the loss of one car space).

Land Description

The review site is located on the north side of Canterbury Road in Blackburn, between Lagoona Court and Boulton Road. It is an irregular lot with a frontage of 36.58 metres, a maximum depth of 80 metres and an overall site area of 2537 square metres. A two-storey dwelling occupies the land, and there are a number of mature trees present – primarily along the western side of the property. The land is within a residential area. Surrounding development is in the form of single-storey and two-storey dwellings. Adjoining to the north is a Melbourne Water retarding basin, which also functions as a public open space area. The locality displays a notable presence of mature canopy trees.

Tribunal Inspection

An accompanied inspection was undertaken on the morning of the second hearing day.

REASONS²

WHAT IS THIS PROCEEDING ABOUT?

- 1 In May 2015, an application was made to the Whitehorse City Council for a planning permit to develop and use the review site for a child care centre. The proposal includes the removal of trees and the alteration of access to Canterbury Road. Notice of the application was given and objections were received. The Council refused a permit on grounds which broadly refer to policy, character, landscape considerations and amenity impacts.
- 2 This is an Application to the Tribunal for a review of the Council's decision.
- 3 The key issue for determination in this matter is whether the development is an acceptable response to the landscape and character of the area. Having considered the submissions and evidence, with regard to the relevant policies and provisions of the Whitehorse Planning Scheme, assisted by my inspection, I have decided to affirm the Council's decision.
- 4 There were a number of other issues raised in the submissions of the parties and addressed by the evidence called by the Applicant. These include car parking, traffic and amenity impacts. I do not propose to make any findings on these, as my conclusions regarding the landscape and character implications of this proposal mean that a different design response is required. Consideration of these issues will need to be undertaken within the context of any new proposal for the land.

WHAT IS PROPOSED?

- 5 The proposed child care centre is a single-storey building with an overall height of 5.8 metres. It is set back a minimum of 13.0 metres from the frontage and extends to within 3.0 metres of the rear boundary. A greater rear setback is provided proximate to the site's north-western corner, where an existing tree is located. The setback from the western boundary is in the order of 7.7 metres, measured to the wall face, to allow for the retention of selected trees. A lesser western setback is shown at the building's north-western corner, where there is a splay in the property boundary. The front portion of the building has a deep setback from the eastern boundary to accommodate part of the car parking area. Beyond this, further to the north within the site, the minimum eastern setback is 1.3 metres.
- 6 The car parking area is positioned in the site's south-eastern corner and extends partly in front of the building. It comprises a central driveway and ninety-degree angle car spaces. A total of 26 spaces are proposed, six of which are in a tandem arrangement. A double-width crossover connects the

² I have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed by persons that did not appear. I do not recite or refer to all of the contents of those documents in these reasons.

driveway to Canterbury Road. A 4.3 metre wide landscape bed is proposed between the car park and the front boundary. The remainder of the front setback, to the west of the car park, is proposed to be landscaped.

- 7 At the commencement of the hearing, the Applicant advised that the car park layout can be modified to include a turning bay, allowing vehicles to manoeuvre on-site and exit the property in a forward direction. This is to meet a VicRoads' requirement. A consequence of this modification is the loss of a car space, with a resultant reduction of the number of children accommodated in the centre from 120 to 116.
- 8 The trees existing on the land are primarily located proximate to the site's western boundary. The majority of the trees are proposed to be retained and be incorporated into the overall landscaping of the property. Several trees are earmarked for removal, either for arboricultural reasons or because the layout of the development does not allow for their retention.
- 9 The frontage is proposed to be defined by a fence constructed of 1.8 metre high brick piers and 1.7 metre high metal picket infill. The remaining boundaries are to have 1.8 metre high timber paling fences.

WHAT IS THE RELEVANT PLANNING CONTEXT?

- 10 The Strategic Framework Plan at Clause 21.04 of the Municipal Strategic Statement (MSS) shows the site and its surrounds as being within a 'significant landscape area'.
- 11 Clause 21.05 sets out a number of strategies in respect of the environment. Amongst others, these seek to ensure that development is of a high quality design that is compatible with the character of the area; adequate open space and landscaping is provided for new development; and that upper canopy trees are planted to enhance the character. Appropriate development which responds to environmental characteristics is encouraged.
- 12 The MSS addresses non-residential uses at Clause 21.06-7. The key issues include ensuring development is designed in a manner which integrates the use and the built form into the residential environment, and ensuring there is no detriment to the community or surrounding residential amenity. The objectives refer to buildings integrating with and respecting the surrounding neighbourhood character. A related strategy is to apply the Neighbourhood Character Precinct Brochures with Preferred Character Statements and Design Guidelines to provide guidance for future non-residential development in residential areas.
- 13 The Whitehorse Neighbourhood Character Study 2014 includes the site within a Bush Environment Precinct. The preferred character statement for this precinct reads:

The streetscapes will be dominated by vegetation with subservient buildings frequently hidden from view behind vegetation and tall trees. The buildings will nestle into the topography of the landscape and be surrounded by bush-like native and indigenous gardens, including large indigenous trees in the private and public domains. Buildings and hard surfaces will occupy a very low proportion of the site. They will be sited to reflect the prevailing front, rear and side setbacks. The larger rear setbacks will accommodate substantial vegetation including large canopy trees. The bushy environs are complemented by a lack of front fencing and street trees. Properties abutting and close to creeks and lake environs will contain more indigenous trees and shrubs that act in part as wildlife corridors. This precinct is identified for the lowest scale of intended residential growth in Whitehorse (Limited Change area) and the preservation of its significant landscape character and environmental integrity is the highest priority.

- 14 A series of guidelines are provided, which specify objectives, design response and things to be avoided. I will refer to these, as relevant, in my consideration of the development's response to the area's character.
- 15 The Planning Scheme includes a Tree Conservation Policy at Clause 22.04. The objectives of this policy refer to minimising the loss of significant trees; ensuring new development does not detract from the natural environment and ecological systems; and promoting the regeneration of tall trees through the provision of adequate open space and landscaping areas in new development. Policy and performance standards in respect of tree retention and tree regeneration are provided, which I will refer to later in these reasons.
- 16 Specific policy for non-residential uses in the municipality's residential areas is provided at Clause 22.05. The objectives of this policy are:

To make provision for services and facilities demanded by local communities in a way that does not detract from the amenity of the area.

To avoid the concentration of non-residential uses where it would:

- Have off-site effects which are detrimental to residential amenity.
- Create a defacto commercial area.
- Isolate residential properties between non-residential uses.

To ensure that the design, scale and appearance of non-residential premises reflects the residential character and streetscape of the area.

To ensure that the location of the use is appropriate to the role and function of the road network and that adequate provision is made for on site car parking.

- 17 Policy in respect of the location, design, landscaping, amenity, car parking and access is detailed in this Clause. Again, I will refer to relevant policy in the reasons.
- 18 The site and its surrounds are included within a Significant Landscape Overlay. The applicable ‘Statement of nature and key elements of landscape’ refers to the quality of the environment which includes vegetation notable for its height, density, maturity and high proportion of Australian native trees. In addition, this is identified as contributing to the significance of the area as a valuable bird and wildlife habitat. The ‘landscape character objective to be achieved’ is:
- To retain the dominance of vegetation cover in keeping with the bush character environment.
 - To encourage the retention and regeneration of native vegetation for the protection of wildlife habitat.
 - To ensure that a reasonable proportion of a lot is free of buildings to provide for the planting of tall trees in a natural garden setting.
 - To encourage the development of sympathetic buildings within an envelope, which ensures the maintenance of a tree-dominated landscape.
 - To ensure that buildings and works retain an inconspicuous profile and do not dominate the landscape.
 - To ensure that development is compatible with the character of the area.
- 19 Decision guidelines, which reflect the above objective, are provided and must be considered before an application is decided.
- 20 In summary, the Planning Scheme’s policies and provisions identify the site as being in an area of landscape significance. The Planning Scheme seeks to ensure that development acknowledges and responds to this significance in an appropriate manner. In broad terms, the dominance of vegetation is to be maintained and enhanced, with development having a more subservient role in its appearance. Existing tall trees are to be retained and protected, and further tree planting introduced to contribute to the area’s canopy. A bush-like setting is sought.

IS THE DEVELOPMENT AN ACCEPTABLE RESPONSE TO THE LANDSCAPE AND CHARACTER OF THE AREA?

- 21 The Applicant submitted that the site’s location on a main road, in particular, should act to temper the application of the Planning Scheme’s environment and landscape policies. The abuttal to a road in an RDZ1 was described as representing a more robust physical context than other parts of the SLO2 and Bush Environment Precinct. To an extent, the Council acknowledged this, but drew attention to the fact that SLO2 also encompasses land on the opposite side of Canterbury Road and extends

southward to include properties with frontage to Drummond Street and Deanswood Road. On this basis, the Council submitted that the review site could not be considered to be at the edge of the SLO2 area.

- 22 Having inspected the site and surrounds, I note that the Canterbury Road abuttal plays an evident role in distinguishing the landscape context of the land from that of properties further to the north, and also to the south beyond the main road. The wide road reservation and its 'hard edge' character influence how the site is perceived. It creates a notably different experience to that within the network of residential streets which sit amongst dense vegetation and dominant canopy trees. Nonetheless, the site forms part of this precinct and there is a policy expectation that development on the land will contribute to the prevailing character. The response may be tempered by the immediate context to a degree, but it should still reasonably provide for the creation of a landscape setting which reflects a bush environment.
- 23 In combination, the building's footprint and the extent of hard pavement associated with the car parking area present as a development outcome which fails to respond acceptably to the area's landscape character. I agree with the submissions that the proposal is too large and too intensive for the site.
- 24 The decision guidelines of SLO2 require consideration of whether the proposed building is set back a reasonable distance from the property boundaries to provide for landscaping, and whether a reasonable proportion of the lot is free of buildings and available for tree planting, landscaping and open space.
- 25 Of itself, the proposed 13.0 metre front setback is sufficiently deep to provide for meaningful landscaping, including the planting of canopy trees. Indeed, it is intended to retain three trees in the south-western corner of the land, proximate to the frontage. These are a Himalayan Cedar, a Lilly Pilly and a Silky Oak, all of which make a contribution to the tree canopy in this part of the site. There is a Swamp Gum in this location and the residents wish to see this tree retained. However, the evidence of Mr Galbraith is that the tree has a low retention value due to a history of major limb shedding, a large canker fungus and major trunk decay. The portion accommodating these trees represents in the order of one-third of the front setback and has dimensions of 12.0 metres by 13.0 metres. The remainder of the front setback comprises a 4.0 – 5.0 metre wide landscape strip and car parking.
- 26 Opportunities for planting will exist adjacent to the frontage. The landscape plan which forms part of Mr Vernon's evidence shows the planting of ground covers and three canopy trees. According to the plant schedule, these trees are expected to have a mature height of 15.0 metres to 20.0 metres. In his oral evidence, Mr Vernon confirmed that mid-storey planting is also proposed here, and stated that such planting is expected to

have a mature height of 5.0 – 6.0 metres. This is not shown in either the landscape plan or the photomontages prepared by Mr Schutt.

- 27 With the exception of the site's south-eastern corner which is intended to accommodate one of the new canopy trees, that part of the eastern boundary which defines the edge of the front setback area has a planting bed with a width of 1.9 metres. Given this more restricted width, within this space it is intended to provide a row of evergreen shrubs. The plant schedule indicates that the proposed specimens are to have a height of between 2.0 metres and 5.0 metres. Further east, it is proposed to provide two medium-sized trees, which are to grow to a height of 8.0 metres. Beyond these are shrubs and climbing plants. In the car park itself, the landscape plan shows two medium evergreen trees, and groundcovers at the edge.
- 28 The car parking area is extensive. It occupies a substantial proportion of the site. The outcome is not consistent with policy. In addressing car parking and access, Clause 22.05 discourages parking at the front of sites. The Bush Environment Precinct Guidelines include an objective of minimising the loss of front garden space and the dominance of car parking structures (I note that no such structures are proposed). A related design response is that hard paving for car parking be minimised and substituted with permeable surfaces where possible. Excessive areas of hard paving and driveways are discouraged.
- 29 Notwithstanding the Applicant's attempt to incorporate planting around and partly within the car parking area, it presents as a large expanse of hard surface which is inconsistent with the policy direction aimed at achieving garden settings, particularly proximate to the site's frontages. When viewed holistically, the building's footprint and the car parking area do not result in a reasonable proportion of the site being available for planting, landscaping and open space. To the contrary, building and paved areas dominate the property.
- 30 As referred to earlier, the development has setbacks from the western boundary which are in the order of 7.7 metres, although the proposed decking partly intrudes into this setback. Two large canopy trees in this setback are to be retained, and will require pruning. Beneath these trees is part of the centre's outdoor play area. Mr Galbraith has recommended the construction of pergolas in this space to intercept any falling limbs and protect children and staff within this space. Perimeter shrub planting is proposed in this area. An acceptable landscape outcome can be achieved within this setback to reflect the bush setting sought by the Planning Scheme.
- 31 No details of the size, location, height or appearance of the recommended pergola structures were provided to allow an assessment of their acceptability or otherwise. Given I am refusing a permit, I will not make any findings on this issue or on the issue of whether it is appropriate to provide outdoor play areas beneath these particular trees, given the



recommended provision of these structures for safety reasons. This is a matter which would need to be addressed as part of any future application.

- 32 The Bush Environment Precinct Guidelines include objectives which are relevant to the proposal's interface with the adjoining retarding basin to the north. These objectives are:

To ensure buildings make a positive contribution to adjacent creeklands and bushland reservations and areas of environmental or landscape significance, and other sensitive landscape environs.

To ensure that new development provides a positive interface with any adjoining parks and open space.

- 33 The proximity of the building to the rear boundary, particularly in the north-eastern corner, and the existence of an easement affect the extent of planting which can be achieved in this part of the site. The landscape plan shows the retention of a Golden Elm and a melaleuca tree, and the proposed inclusion of an evergreen canopy tree in the north-western corner. A similar tree is shown in the north-eastern corner in an area bounded to the south and west by the building and adjacent deck. It is proposed to remove a 5.0 metre high eucalypt on the basis that it is an inappropriate species for the location. When considered in conjunction with the vegetation within the retarding basin, the landscaping should achieve an acceptable outcome and largely screen the building from view. To the extent that the building will be visible, it will not be out of keeping with what is presently the case for neighbouring development.

- 34 Concerns were expressed by the Council and the residents regarding the space provided within the site for the new trees. In this respect, reference was made to the policy at Clause 22.04, specifically:

The site for a new tree should be:

Separated by a minimum distance of 3 metres from a building.

...

In the areas included in a Significant Landscape Overlay, situated in a minimum area of 50m² of open ground with a minimum dimension of 5 metres that is free of buildings and impervious surfaces and of other tree canopies, to minimise competition and facilitate normal growth.

- 35 The spaces within which the proposed trees are to be planted do not achieve the area specified in the policy. Notwithstanding, the evidence is that the trees will establish and reach their anticipated mature height. Amongst the recommended measures to ensure this happens is the use of structural soil and permeable pavers in those car spaces adjacent to the trees to allow for root growth and for the penetration of water and soil.
- 36 Given I have determined to refuse a permit, I do not need to make a finding on whether the non-compliance with this policy is acceptable. However, the inability to provide the nominated area of 'open ground' in almost every

instance where a new tree is proposed is, perhaps, a further indicator that the development is too intensive for this site.

CONCLUSION

37 For the reasons explained above, the decision of the Responsible Authority is affirmed. No permit is to issue.

Bill Sibonis
Member